

Brandywine Industrial Paper,  
Inc.,  
  
Plaintiff,  
  
v.  
  
Chemical Leaman Tank Lines,  
Inc., and Chemical Leaman  
Corporation,  
  
Defendants.

CIVIL ACTION  
NO. 97-CV-8121

McGlynn, J. \_\_\_\_\_, 1998

## I. BACKGROUND

The plaintiff, Brandywine Industrial Paper, Inc.

("Brandywine"), owns property adjacent to the defendants' property in Downingtown, Pennsylvania. See First Am. Compl. ¶ 1. Brandywine alleges the defendants used, stored and disposed of various chemicals on their property that later contaminated Brandywine's property. See First Am. Compl. ¶¶ 8-11, 29.

On August 14, 1997 Brandywine mailed a letter of Notice of intent to sue under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 et seq. (1995 & Supp. 1998), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 et seq. (1995 & Supp. 1998), the Toxic Substances Control Act ("TOSCA"), 15 U.S.C. § 2601 et seq. (1998),<sup>1</sup> and other pertinent environmental statutes. See Brandywine's Notice Letter at 1-2. The recipients of the notice letter were the defendants, the Administrator of the U.S. Environmental Protection Agency ("EPA"), the regional EPA Administrator, the U.S. Attorney General and the Pennsylvania Attorney General. See Brandywine's Notice Letter at 1-2. On December 30, 1997 Brandywine sued the defendants in federal court. Brandywine amended its complaint on April 15, 1998. The First Amended Complaint contains claims under the RCRA, the CERCLA and the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1251 et

---

<sup>1</sup> Brandywine did not sue under the TOSCA.

seq. (1986 & Supp. 1998); and several state statutory and common law claims. Following Brandywine's amendment of its complaint, the defendants moved the court to dismiss the First Amended Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and, alternatively, to dismiss the First Amended Complaint's state statutory and/or common law claims for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

## II. DISCUSSION

A Rule 12(b)(1) motion threatens the court's "very power to hear the case." Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (quoting Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); see Darbouze v. Chevron Corp., No. CIV. A. 97-2970, 1998 WL 42278, at \*2 (E.D.Pa. Jan. 8, 1998). The court thus may review evidence outside the pleadings as it never could under Federal Rules 12(b)(6) or 56 of Civil Procedure. Dalton, 107 F.3d at 1021 (quoting Mortensen, 549 F.2d at 891). The court may evaluate the merits of the jurisdictional claims without presuming the truthfulness of the plaintiff's allegations and despite the existence of disputed material facts. Id. The burden of persuasion in challenges to the court's subject matter jurisdiction is on the party invoking the court's jurisdiction. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991), cert. denied, 501 U.S. 1222, 111

S.Ct. 2839, 115 L.Ed.2d 1007 (1991); Lipson v. Jackson Nat. Life Ins. Co., No. CIV A 97-8051, 1998 WL 761851, at \*2 (E.D.Pa. Oct. 27, 1998). Without subject matter jurisdiction over the claim, the court can only dismiss the claim without prejudice. See Fed.R.Civ.P. 12(h)(3); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981) ("A court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . .")

#### **A. ORIGINAL JURISDICTION**

Brandywine claims the court has subject matter jurisdiction on diversity of citizenship grounds pursuant to 28 U.S.C. § 1332 and federal question grounds pursuant to 28 U.S.C. § 1331. See Brandywine's Response Defs.' Mot. Dismiss ¶ 2. Since complete diversity of citizenship is absent,<sup>2</sup> the court has no diversity jurisdiction. See Caterpillar, Inc. v. Lewis, 519 U.S. 61, 117 S.Ct. 467, 472, 136 L.Ed.2d 437 (1996) (noting its adherence to complete diversity requirement); see also 15 James Wm. Moore et al., Moore's Federal Practice § 102.12 (3d ed. 1998) (discussing the complete diversity requirement). The alleged federal question grounds in the First Amended Complaint are Brandywine's citizen suit claims under subsection 7002(a)(1) of the RCRA, 42 U.S.C. § 6972(a)(1) (1995), subsection 310(a)(1) of the CERCLA,

---

<sup>2</sup> The First Amended Complaint states that Brandywine and Chemical Leaman Corporation both are Pennsylvania corporations. See First Amended Complaint ¶¶ 1-2.

42 U.S.C. § 9659(a)(1) (1995) and subsection 505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1) (1986).<sup>3</sup> See First Amended Complaint ¶¶ 47-51.

The defendants argue that the court lacks subject matter jurisdiction because Brandywine failed to adhere to the RCRA, the CERCLA and the CWA notice requirements for citizen suits. See Defs.' Br. Supp. Mot. Dismiss at 8-11. Although the RCRA, the CERCLA and the CWA statutes are silent regarding the method of notice, EPA regulations exist to explain how to provide notice to an alleged violator. See 40 C.F.R. § 254 (1998) (RCRA notice regulations); 40 C.F.R. § 374 (1998) (CERCLA notice regulations); 40 C.F.R. § 135 (1998) (CWA notice regulations). In interpreting the notice requirements, the court may consider the judicial interpretations of like requirements in other federal environmental statutes. See Hallstrom v. Tillamook County, 493 U.S. 20, 22-23, 110 S.Ct. 304, 307, 107 L.Ed.2d 237 (1989) (noting similarity of RCRA's notice provision to those of other environmental statutes); Hawksbill Sea Turtle v. Fed. Em. Management Agency, 126 F.3d 461, 471 (3d Cir. 1997) (relying on cases interpreting notice requirements of various federal environmental statutes to interpret notice requirements of

---

<sup>3</sup> Brandywine's attempts to satisfy the notice requirements of citizen suit provisions of the RCRA, the CERCLA and the CWA on August 14, 1997 and subsequent to suit indicate that Brandywine's suit is a citizen suit.

Endangered Species Act of 1973, 16 U.S.C. § 1536 et seq. (1985 & Supp. 1998); see also 3 Susan M. Cooke et al., The Law of Hazardous Waste: Management, Cleanup, Liability and Litigation § 16.03[3][c][ii] (1998) (stating that the Supreme Court in Hallstrom did not want to confine its holding to RCRA claims).

Citizen suit claims of federal environmental statutes like the RCRA, the CERCLA and the CWA that fail to comply with notice requirements must be dismissed. See Hallstrom, 493 U.S. at 32, 110 S.Ct. at 312 ("[W]here a party suing under the citizen suit provisions of RCRA fails to meet the notice and 60-day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute."); Public Interest Research Group of N.J., Inc. v. Windall, 51 F.3d 1179, 1189 n. 15 (3d Cir. 1995) (noting that similar CWA provision is prerequisite to suit); Grine v. Coombs, No. CIV. A. 95-342, 1997 U.S. Dist. LEXIS 19690 at \*17 (W.D.Pa. 1997)("[F]ailure to comply with the notice requirements deprives the court of jurisdiction and requires dismissal of the action."); Fried v. Sungard Recovery Services, Inc., 900 F.Supp. 758, 767 (E.D.Pa. 1995) (dismissing claim for failure to satisfy the notice requirements of CERCLA citizen suit provisions). The notice requirements are strictly interpreted to serve the congressional goal of striking "a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with

excessive numbers of citizen suits." Hallstrom, 493 U.S. at 29, 110 S.Ct. at 310.

### **1. Timing of Notice**

The defendants argue that Brandywine did not satisfy the RCRA notice requirement for citizen suits because Brandywine did not send the Pennsylvania Department of Environmental Protection ("PADEP") a notice letter within the requisite time period before suing. See Defs.' Br. Supp. Mot. Dismiss at 10-11. After the plaintiff gives notice of the RCRA violation to the Administrator of the EPA, the State in which the violation occurred and the alleged violator, the plaintiff must wait sixty days under subsection 7002(a)(1)(A) of the RCRA or ninety days under subsection 7002(a)(1)(B) before suing. See 42 U.S.C. § 6972(b). The State's notice must be received in part by the "chief administrative officer of the solid waste management agency for the state in which the violation is alleged to have occurred . . ." 40 C.F.R. § 254.2(a)(1) (1998). The Pennsylvania Department of Environmental Protection ("PADEP") is Pennsylvania's solid waste management agency. See 35 Pa. Cons. Stat. Ann. § 6018.104(1) (West 1993).

Brandywine sent the PADEP a notice letter on May 20, 1998 after bringing suit. Brandywine contends that this letter cures Brandywine's non-compliance with the RCRA notice requirement. See Brandywine's Mot. Amend at 2. However, the failure to comply

with the timing of notice requirements is incurable. See Hallstrom, 493 U.S. at 29-31, 110 S.Ct. at 310-11 (stating that compliance with RCRA's notice requirement is mandatory condition precedent to suit). Therefore, the court must dismiss the RCRA claim.

## **2. Content of the Notice**

The defendants also argue that Brandywine failed to satisfy the CERCLA and the CWA notice requirements for citizen suits because the content of Brandywine's notice letter does not specify the CERCLA and the CWA provisions the defendants allegedly violated.<sup>4</sup> Defs.' Br. Supp. Mot. Dismiss at 10-11. To

---

<sup>4</sup> The notice letter in a suit under subsection 310(a)(1) of the CERCLA must:

include sufficient information to allow the recipient to identify the specific standard, regulation, condition, requirement, or order . . . which has allegedly been violated; the activity or failure to act alleged to constitute a violation; the name and address of the site and facility alleged to be in violation, if known; the person or persons responsible for the alleged violation; the date or dates of the violation; and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 374.3(a). Similarly, the notice letter in a suit under subsection 505(a)(1) of the CWA must:

include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.



determine whether the plaintiff complied with these requirements, the court must consider whether the notice letter provides the recipient with effective and timely notice. See Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239, 1249 (3d Cir. 1995); Fried, 900 F.Supp. at 764-65. Effective and timely notice exists if it provides the EPA and the State with enough information to enable them intelligently to decide whether to initiate an enforcement action and it provides the alleged violator "with enough information to be able to bring itself into compliance." Hercules, 50 F.3d at 1249. Although the notice does not need to identify every detail of a violation, the notice must "sufficiently inform its recipients of the violations upon which a citizen intends to bring suit. . . ." Id. at 1248.

The Third Circuit Court of Appeals in Hercules permitted the plaintiff to bring suit for alleged CWA violations that were not mentioned in the notice letter so long as they were of the same type as those mentioned in the notice letter. See Hercules, 50 F.3d at 1250-52. The original notice letter in Hercules listed several discharges which allegedly had occurred from April 1985 through February 1989 in violation of the CWA. See Id. at 1242-43. The notice letter stated the specific pollutants the defendant discharged and the permit parameters the defendant

---

40 C.F.R. § 135.3(a).

exceeded. See Id. at 1243.

The district court in Fried interpreted a content of notice regulation for the Clean Air Act and determined that the plaintiff's notice letter was barely adequate. See Fried, 900 F.Supp. at 765. The notice letter in Fried was adequate because it provided the plaintiff's full name, the alleged violators' identities, the location of the alleged violations, the average general range of dates of the violations and a description of the alleged violative activity. See Id. at 764-65. The notice letter stated that the alleged violations occurred between 1990 and 1994 and are continuing. See Id. at 765.

Unlike the notice letters in Hercules and Fried, Brandywine's notice letter does not provide an average general range of the dates of the CWA and CERCLA violations.<sup>5</sup> Moreover, Brandywine failed to even mention the CWA as a basis for suit in the notice letter.

Nevertheless, Brandywine argues that its notice letter was sufficiently specific. See Brandywine's Response Defs.' Mot. Dismiss at 8-9. Moreover, Brandywine asserts that its notice letter was sufficiently specific because it included a chemist report identifying the nature of the contaminants of Brandywine's property. See Brandywine's Response Defs.' Mot. Dismiss at 8-9.

---

<sup>5</sup> Brandywine merely states that the defendants committed violations "over a period of several years . . . ." Brandywine's Notice Letter at 1.

However, by neither mentioning the CWA nor providing an average general range of the dates of the CWA and the CERCLA violations, Brandywine's notice letter fails to meet even the minimum content requirement standard espoused by the court in Fried. Although specific dates of alleged violations are not necessary for adequate notice, a discrete specific time frame is. See Fried, 900 F.Supp. at 765; see also Hudson Riverkeeper Fund, Inc. v. Putnam Hosp. Ctr., Inc., 891 F.Supp. 152, 154 (S.D.N.Y. 1995). Brandywine's notice letter simply does not provide the EPA or the State with enough information to decide whether to take an enforcement action and does not provide the defendants with enough information to be able to bring itself into compliance. Therefore, the court must dismiss the CERCLA and the CWA claims.

#### **B. Supplemental Jurisdiction**

Finally, the defendants contend that the court has no supplemental jurisdiction over the remaining state statutory and common law claims without original jurisdiction. Defs.' Br. Supp. Mot. Dismiss at 11-13. 28 U.S.C. § 1367(c) states in pertinent part that "[t]he district courts may decline to exercise supplemental jurisdiction over a [state law claim] if . . . the district court has dismissed all claims over which it has original jurisdiction[.]" 28 U.S.C. § 1367(c). When all federal claims are dismissed, the district court should ordinarily

decline to decide the state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so. Borough of West Mifflin v. Lancaster, et al., 45 F.3d 780, 788 (3d Cir. 1995); Reading Company v. City of Philadelphia, No. CIV A. 91-2377, 1996 WL 251511 at \*2 (E.D.Pa. May 9, 1996).

Here, no affirmative justification for deciding Brandywine's state claims exists because the court has not expended resources in adjudicating the remaining claims, the state court is equally convenient to the federal court and the remaining claims are in the early stages of litigation. Therefore, the court will decline to decide Brandywine's state statutory and common law claims.

### **III. CONCLUSION**

For the above stated reasons, the defendants' Rule 12(b)(1) motion will be granted.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____	:	
Brandywine Industrial Paper,	:	
Inc.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 97-CV-8121
Chemical Leaman Tank Lines,	:	
Inc., and Chemical Leaman	:	
Corporation,	:	
	:	
Defendants.	:	
_____	:	

ORDER

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 1998, upon consideration of the motion of the defendants, Chemical Leaman Tank Lines, Inc. and Chemical Leaman Corporation, to dismiss the First Amended Complaint pursuant to Rule 12(b)(1) and, alternatively, to dismiss the state statutory and/or common law claims of the First Amended Complaint pursuant to Rule 12(b)(6), and the opposition of the plaintiff, Brandywine Industrial Paper, Inc., thereto, it is hereby ORDERED that the motion to dismiss pursuant to Rule 12(b)(1) is GRANTED.

BY THE COURT

\_\_\_\_\_  
JOSEPH L. MCGLYNN, JR. J.